

HOUSE JUDICIARY COMMITTEE AMENDMENT NO. 1

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by deleting SECTION 1, 2 and 3 in their entirety and substituting instead the following;

SECTION 1. Tennessee Code Annotated, Title 40, Chapter 30 is amended by deleting the chapter in its entirety and by substituting instead the following:

§ 40-30-101. Short title.--This chapter may be referred to as the "Post-Conviction Procedure Act."

§ 40-30-102. When prisoners may petition for post-conviction relief.--(a) Except as provided in subsection (b) and (c), a person in custody under a sentence of a court of this state must petition for post-conviction relief under this chapter within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred. The statute of limitations shall not be tolled for any reason.

(b) Consideration of a petition filed after such time shall be barred unless:

(1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such petition must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial;

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(2) The claim in the petition is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and said conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

(c) This chapter contemplates the filing of only one (1) petition for post conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed. A petitioner may move to reopen a post- conviction proceeding that has been concluded, under the limited circumstances set out in Section 40-30-118.

§ 40-30-103. Grounds for relief.--(a) Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the constitution of this state or the Constitution of the United States.

§ 40-30-104. Petition.--(a) A post-conviction proceeding is commenced by filing with the clerk of the court in which the conviction occurred a written petition naming the State of

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Tennessee as the respondent. No filing fee shall be charged. Petitions challenging misdemeanor convictions not in a court of record shall be filed in a court of record having criminal jurisdiction in the county in which the conviction was obtained, and the case shall be assigned as set forth in section 40-30- 105(b).

(b) The petitioner shall provide all information required by this section. Petitions which are incomplete shall be filed by the clerk, but shall be completed as set forth in an order entered in accordance with § 40-30-106(d).

(c) The petition for post-conviction relief shall be limited to the assertion of claims for relief from the judgment or judgments entered in a single trial or proceeding. If the petitioner desires to obtain relief from judgments entered in separate trials or proceedings, he must file separate petitions.

(d) The petitioner shall include all claims known to him for granting post-conviction relief and shall verify under oath that he has done so.

(e) The petitioner shall include allegations of fact supporting each claim for relief set forth in the petition and allegations of fact explaining why each ground for relief was not previously presented in any earlier proceeding. The petition and any amended petition shall be verified under oath. Affidavits, records or other evidence available to the petitioner supporting the allegations of the petition may be attached to it.

(f) The petitioner shall provide the name of any attorney licensed to practice law who drafts or has given assistance or advice regarding drafting the petition for post-conviction relief.

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(g) Amendments to the petition shall conform substantially to the form for original petitions, except that matters alleged in the original petition need not be repeated.

§ 40-30-105. Processing of petitions--designation of judge.--(a) When in receipt of a petition applying for post-conviction relief, the clerk of the trial court shall forthwith:

- (1) Make three (3) copies of the petition;
- (2) Docket and file the original petition and its attachments;
- (3) Mail one copy of the petition to the attorney general and reporter in Nashville;
- (4) Mail or forward one (1) copy of the petition to the district attorney general;
- (5) Mail or forward one (1) copy to petitioner's original attorney;
- (6) Advise the presiding judge that the petition has been filed; and
- (7) Deliver the petition, its attachments, and all available files, records, transcripts, and correspondence relating to the judgment under attack to the assigned judge for preliminary consideration.

(b) At either the trial proceeding or an appellate proceeding reviewing the proceeding, the presiding judge of the appropriate court shall assign a judge to hear the petition. The issue of competency of counsel may be heard by a judge other than the original hearing judge. If a presiding judge is unable to assign a judge, the Chief Justice of the Supreme Court shall designate an appropriate judge to hear the matter.

(c) A petition for habeas corpus may be treated as a petition under this chapter when the relief and procedure authorized by this chapter appear adequate and appropriate,

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notwithstanding anything to the contrary in Tennessee Code Annotated, Title 29, Chapter 21, or any other statute.

§ 40-30-106. Preliminary consideration.--(a) The trial judge to whom the case is assigned shall, within thirty (30) days of the filing of the original petition, or a petition amended in accordance with subsection (d) of this section, examine it together with all the files, records, transcripts, and correspondence relating to the judgment under attack, and enter an order in accordance with the provisions of this section or § 40-30-107.

(b) If it plainly appears from the face of the petition, any annexed exhibits or the prior proceedings in the case that the petition was not filed in the court of conviction or within the time set forth in the statute of limitations or that a prior petition was filed attacking the conviction and was resolved on the merits, the judge shall enter an order dismissing the petition. The order shall state the reason for the dismissal and the facts requiring dismissal. If the petition is dismissed as untimely, the order shall state or the record shall reflect the date of conviction, whether an appeal was taken, the name of each court to which an appeal was taken, the date of the final action by each appellate court, and the date upon which the petition was filed.

(c) If it appears that a post-conviction petition challenging the same conviction is already pending in either the trial court, Court of Criminal Appeals, or Supreme Court, the judge shall enter an order dismissing the subsequent petition. The order shall state the style of the pending petition and in which court it is pending.

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(d) The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition.

(e) If a petition amended in accordance with subsection (d) of this section is incomplete, the court shall determine whether the petitioner is indigent and in need of counsel. The court may appoint counsel and enter a preliminary order if necessary to secure the filing of a complete petition. Counsel may file an amended petition within thirty (30) days of appointment.

(f) Upon receipt of a petition in proper form, or upon receipt of a petition amended in accordance with subsection (d) of this section, the court shall examine the allegations of fact in the petition. If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed. The order of dismissal shall set forth the court's conclusions of law.

(g) A ground for relief is waived if the petitioner on his own or through his attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

(1) the claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the state or federal constitution requires retroactive application of that right; or

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(2) the failure to present the ground was the result of state action in violation of the federal or state constitution.

(h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

(i) If the petition is not dismissed pursuant to this rule, the court shall enter a preliminary order as provided in § 40-30-107.

§ 40-30-107. Preliminary order.--(a) If the petition is not dismissed upon preliminary consideration, the court shall enter a preliminary order.

(b) In all cases, the preliminary order shall direct the following:

(1) If a petitioner not represented by counsel requests counsel and the court is satisfied that the petitioner is indigent as defined in § 40-14-201, the court shall appoint counsel to represent the petitioner.

(2) If counsel is appointed or retained, or the petitioner is proceeding pro se, counsel or the petitioner if proceeding pro se must file an amended petition or a written notice that no amendment will be filed. Said amended petition or notice shall be filed within thirty (30) days of the entry of the preliminary order, unless extended for good cause. The written notice, if filed by counsel, shall state that counsel has consulted the petitioner and that the petitioner agrees there is no

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need to amend the petition. Good cause will not be met by a routine statement that the press of other business prevents the filing of the appropriate pleadings within the designated time.

§ 40-30-108. Answer or response.--(a) The district attorney general shall represent the state and file an answer or other responsive pleading within thirty (30) days, unless extended for good cause. Good cause will not be met by a routine statement that the press of other business prevents a response within the thirty (30) day period. Failure by the state to timely respond does not entitle the petitioner to relief under the post-conviction act.

(b) If the petition does not include the records or transcripts, or parts of records or transcripts that are material to the questions raised therein, the district attorney general is empowered to obtain them at the expense of the state and may file them with the responsive pleading or within a reasonable time thereafter.

(c) The district attorney general may at such general's option assert by motion to dismiss that:

- (1) The petition is barred by the statute of limitations;
- (2) The petition was not filed in the court of conviction;
- (3) The petition asserts a claim for relief from judgments entered in separate trials or proceedings;
- (4) A direct appeal or post-conviction petition attacking the same conviction is currently pending in the trial or appellate courts;

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(5) The facts alleged fail to show that the petitioner is entitled to relief; or

(6) The facts alleged fail to establish that the claims for relief have not been
waived or previously determined.

(d) The answer shall respond to each of the allegations of the petition and shall assert
such affirmative defenses as the district attorney general deems appropriate.

§ 40-30-109. Prehearing procedure.--(a) The court shall review the case after the
district attorney general's response is filed. If, on reviewing the petition, the response, files, and
records, the court determines conclusively that the petitioner is entitled to no relief, the court
shall dismiss the petition. The order of dismissal shall set forth the court's conclusions of law. If
the court does not dismiss the petition the court shall enter an order setting an evidentiary
hearing. The order of dismissal or the order setting an evidentiary hearing shall be entered no
later than thirty (30) days after the filing of the state's response. The evidentiary hearing shall be
within four (4) calendar months of the entry of the court's order. Such deadline shall not be
extended by agreement, and such deadline may be extended only by order of the court based
upon a finding that unforeseeable circumstances render a continuance a manifest necessity.
Such extension shall not exceed sixty (60) days.

(b) Discovery is not available in a proceeding under this section except as provided under
Rule 16 of the Tennessee Rules of Criminal Procedure.

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(c) The petitioner may withdraw a petition at any time prior to the hearing without prejudice to his rights to refile, but the withdrawn petition shall not toll the statute of limitations set forth in Section 40-30-102.

§ 40-30-110. Hearing.--(a) The petitioner shall appear and give testimony at the evidentiary hearing if his petition raises substantial questions of fact as to events in which he participated, unless the petitioner is incarcerated out of state, in which case the trial judge may permit the introduction of an affidavit or deposition of the petitioner and shall permit the state adequate time to file any affidavits or depositions in response it may wish.

(b) (1) If the petitioner is imprisoned, the warden shall arrange for transportation of the petitioner to and from the court upon proper orders issued by the trial judge.

(2) The sheriff of the county where the proceeding is pending shall have the authority to receive and transport the petitioner to and from the penitentiary and the court, if the court so orders or if for any reason the warden is unable to transport him. The sheriff shall be entitled to the same costs allowed for the transportation of prisoners as is provided in criminal cases upon the presentation of the account certified by the judge and district attorney general.

(c) Proof upon the petitioner's claim or claims for relief shall be limited to evidence of the allegations of fact in the petition.

(d) All evidentiary hearings shall be recorded.

(e) The Tennessee Rules of Evidence shall apply except as otherwise required in this chapter.

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(f) The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence. There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived.

§ 40-30-111. Final disposition of petitions.--(a) If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, including a finding that trial counsel was ineffective on direct appeal, the court shall vacate and set aside the judgment or order a delayed appeal as hereinafter provided and shall enter an appropriate order and any supplementary orders that may be necessary and proper. Costs shall be taxed as in criminal cases.

(b) Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented and shall state the findings of fact and conclusions of law with regard to each such ground.

(c) Where the petitioner has court-appointed counsel, the court may require petitioner's counsel to file a verified statement of dates and times he has consulted with petitioner and this statement shall become a part of the record.

(d) The court shall rule within sixty (60) days of conclusion of the proof. Such deadline shall not be extended by agreement, and such deadline may be extended only by order of the court based upon a finding that unforeseeable circumstances render a continuance a manifest necessity. Such extension shall not exceed thirty (30) days. Final disposition of a capital case

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must be made within one (1) year of the filing of the petition. Copies of all orders extending deadlines in capital cases shall be sent to the office of the administrator of the courts. The administrative office of the courts shall report annually to the general assembly on the compliance by the courts with the time limits established for capital cases and the reason for noncompliance, if any.

§ 40-30-112. Notice of final judgments by clerk of court.--The clerk of the court shall send a copy of the final judgment to the petitioner, the petitioner's counsel of record, any authority imposing restraint on the petitioner and the attorney general and reporter at Nashville.

§ 40-30-113. Petitioner unconstitutionally denied appeal--Procedure.--(a) When the trial judge conducting a hearing pursuant to this chapter finds that the petitioner was denied his right to an appeal from his original conviction in violation of the Constitution of the United States or the Constitution of Tennessee and that there is an adequate record of the original trial proceeding available for such review, the judge can:

- (1) If a transcript was filed, grant a delayed appeal;
- (2) If, in the original proceedings, a motion for a new trial was filed and overruled but no transcript was filed, authorize the filing of the transcript in the convicting court; or
- (3) If no motion for a new trial was filed in the original proceeding, authorize such motion to be made before the original trial court within thirty (30) days. Such motion shall be disposed of by the original trial court as if the motion had been filed under authority of Rule 59 of the Rules of Civil Procedure.

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(b) An order granting proceedings for a delayed appeal shall be deemed the final judgment for purposes of review. If either party does appeal, the time limits provided in this section shall be computed from the date the clerk of the trial court receives the order of the appellate court determining the appeal.

(c) The judge of the court which sentenced a prisoner who has sought and obtained relief from that sentence by any procedure in a federal court is likewise empowered to grant the relief provided in this section.

§ 40-30-114. Reimbursement of expenses of district attorney general--Duty of attorney general & reporter.--(a) The district attorney general shall be reimbursed for any expenses including travel incurred in connection with the preparation and trial of any proceeding under this chapter. This expense shall be paid by the state of Tennessee, and shall not be included in the expense allowance now received by the various district attorneys general.

(b) (1) It is the duty and function of the attorney general and reporter, and his staff, to lend whatever assistance may be necessary to the district attorney general in the trial and disposition of such cases.

(2) In the event an appeal is taken or a delayed appeal in the nature of a writ of error is granted, the attorney general and reporter, and his staff, shall represent the state and prepare and file all necessary briefs in the same manner as now performed in connection with criminal appeals.

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§ 40-30-115. Determination of indigency--Appointment of counsel and court

reporters.-- Indigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by Chapter 14, Parts 2 and 3 of this title.

§ 40-30-116. Appeal after final judgment.-- The order granting or denying relief under the provisions of this chapter shall be deemed a final judgment, and an appeal may be taken to the court of criminal appeals in the manner prescribed by the Tennessee Rules of Appellate Procedure. In capital cases, the appellate court in which the case is pending shall render a decision within nine (9) months of the date of oral argument in the case, if oral argument is conducted. If no oral argument occurs, the court shall render an opinion within nine (9) months after submission of the case to the court for decision. The appellate court shall have thirty (30) days in which to dispose of any petition to rehear which may be filed. If an appellate court finds that it is unable to comply with such deadlines, it shall enter an order setting out the circumstances which render an extension beyond these time limits a necessity. Copies of all such orders shall be sent to the office of the administrator of the courts. The administrative office of the courts shall report annually to the general assembly on the compliance of the appellate courts with the time limits established in this section.

§ 40-30-117. Motions to reopen.-- (a) A petitioner may file a motion in the trial court to reopen the first post-conviction petition only if the following applies:

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(1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial; or

(2) The claim in the motion is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and said conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid, and

(4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have his conviction set aside or his sentence reduced.

(b) The motion must set out the factual basis underlying its claims and must be supported by affidavit. The motion shall be denied unless the factual allegations, if true,

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meet the requirements of subsection (a) of this section. If the court grants the motion, the procedure, relief and appellate provisions of this chapter shall apply.

(c) If the motion is denied, the petitioner shall have ten (10) days to file an application in the court of criminal appeals seeking permission to appeal. The application shall be accompanied by all of the documents filed by both parties in the trial court and the order denying the motion. The state shall have ten (10) days to respond. The court of criminal appeals shall not grant the application unless it appears that the trial court abused its discretion in denying the motion. If it determines that the trial court did so abuse its discretion, the court of criminal appeals shall remand the matter to the trial court for further proceedings.

§ 40-30-118. Promulgation of rules.-- The supreme court may promulgate rules of practice and procedure consistent with this chapter, including rules prescribing the form and contents of the petition, the preparation and filing of the record and assignments of error for simple appeal and for delayed appeal in the nature of a writ of error and may make petition forms available for use by petitioners. The Supreme Court shall develop a form which shall be available without cost to a prisoner in the prison and other places of detention and shall also be available without cost to any potential petitioner in the office of the clerk of any court of record having criminal jurisdiction.

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§ 40-30-119. Bail during new trial or delayed appeal--Exception.-- When a new trial or delayed appeal is granted, release on bail shall be determined by the trial judge as provided by law pending further proceedings. In all other cases the petitioner shall not be entitled to bail.

§ 40-30-120. Stays of execution when petitioner is under sentence of death.--(a)
When affirming a conviction and sentence of death on direct appeal, the Tennessee Supreme Court shall contemporaneously set a date for an execution. Such date shall be no less than four (4) months from the date of the judgment of the Tennessee Supreme Court. Upon the filing of a petition for post-conviction relief, the court in which the conviction occurred shall issue a stay of the execution date which shall continue in effect for the duration of any appeals or until the post-conviction action is otherwise final. The execution date shall not be stayed prior to the filing of a petition for post-conviction relief except upon a showing by the petitioner that he is unable to file a petition prior to the execution date and that such inability is justified by extraordinary circumstances beyond his control.

(b) Where the petitioner is under a sentence of death and the petition is not the first petition under this chapter attacking that judgment, or a motion to reopen has been filed, no court may stay the execution unless a court of competent jurisdiction first finds that a motion to reopen which meets the requirements set out in § 40-30-117 has been granted.

(c) The mere satisfaction of the requirements of subsection (b) shall not automatically result in a stay. In order to obtain a stay, an applicant must show that upon the court's consideration of the petition there is a significant possibility that the death sentence will be

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invalidated and that there is a significant possibility that the death sentence will be carried out before consideration of the petition is concluded.

(d) Any motion for stay pending consideration of the post-conviction petition must be presented first to the court where the petition is filed. The decision of the court shall be reviewable by the court of criminal appeals upon the filing of a motion for review. Either party may seek review. The lower court's determination shall not be set aside unless the movant demonstrates an abuse of discretion. The action of the court of criminal appeals shall likewise be reviewable upon the filing of a motion for review in the Tennessee Supreme Court. Either party may seek review. The determination of the court of criminal appeals shall not be set aside unless the movant demonstrates an abuse of discretion.

(e) Each motion for stay, or motion for review, shall be filed in writing with the clerk of the court to whom the motion is directed. The clerk shall immediately refer the matter to the court. Each motion shall be served upon opposing counsel in the most expeditious manner practicable. The motion shall recite that opposing counsel has been served and in what manner. Oral requests directed to a judge are prohibited unless, owing to emergency circumstances, the filing of a written motion is impractical. In such event, counsel initiating such contact shall orally notify opposing counsel prior to any such contact.

(f) Motions for review may be acted upon by a single judge of the appellate court. Such judge may, in lieu thereof, refer the motion to the court. In the court of criminal appeals, such reference will be to a three (3) judge panel of the court in the grand division where the motion is

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filed. Review shall be made promptly within five (5) days or within such shorter period as necessary to preclude the issue from becoming moot, whether by a single judge or by the court. Oral argument shall not be permitted unless the court otherwise directs. Opposing counsel shall have a right to file a written response to the motion within three (3) days of the service of the motion. If time does not permit the filing of a written response, the court shall ascertain the position of opposing counsel by other means which may include a telephone conference. The court may consider the last-minute nature of an application to stay execution by resolving against the petitioner any doubts and uncertainties as to the sufficiency of his submission.

40-30-121. Priority.-- Post-conviction cases where the petitioner is under the death sentence shall be given priority over all other matters in docketing by the courts having trial and appellate jurisdiction of the cases

§ 40-30-122. Interpretation.-- For purposes of this chapter, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

SECTION 2. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the other provisions or applications

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of the Act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it and shall govern all petitions for post-conviction relief filed after this date, and any motions which may be filed after this date to reopen petitions for post-conviction relief which were concluded prior to the effective date of this act. Notwithstanding any other provision of this act to the contrary, any person having a ground for relief recognized under this act shall have at least one (1) year from the effective date of this act to file a petition or a motion to reopen a petition under this act.